



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

September 26, 2011

Sara J. Wan
22350 Carbon Mesa Road
Malibu, CA 90265

**RE: Your Request for Advice
Our File No. A-11-169**

Dear Ms. Wan:

This letter is in response to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the "Act").¹ The Commission does not act as a finder of fact when providing advice; this advice is based on the facts you provide. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Further, please note that our advice is based solely on the Act. We therefore offer no opinion on the application, if any, of other post-government employment restrictions such as those in the Public Contract Code Section 10411. We urge you to consult private counsel regarding the potential application of other laws.

QUESTION

Pursuant to the provisions of the Act, may you, as a former member of the California Coastal Commission, advise groups that might be opposed to a Sonoma County Water Agency's application for a Coastal Commission permit changing the management plan for the mouth of the Russian River?

CONCLUSION

The Act's permanent ban does not bar you from advising on the amendment to the Coastal Development Permit before the Coastal Commission. The Act's one-year ban prohibits you from appearing before or communicating with the Coastal Commission, even when the appearance or communication is in a new proceeding.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The Regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You were a member of the California Coastal Commission and left that position on May 20, 2011. While a member of the Coastal Commission, in 2002, you voted on a Coastal Development Permit (2-01-033) filed by the Sonoma County Water Agency (SCWA) to periodically breach the estuary at the Russian River in Sonoma County. The Coastal Commission staff advised at that time that the proposed breaching would result in the continuation of a long-standing practice of managing the river mouth predominantly as an “open” estuary by preventing extended bar closure conditions. In 2010, you voted for an immaterial Amendment to the permit.

In August of 2011, SCWA had an Environmental Impact Report certified by the Sonoma County Board of Supervisors for a new management plan for the Russian River Estuary.

ANALYSIS

The Act has three main post-governmental employment restrictions on individuals who have recently left state service. The one relevant to your inquiry is the “permanent ban”² which bars a former state employee from “switching sides” in any specific proceeding in which the State of California is a party and the state employee was a participant. (Section 87401.) Similarly, a former state employee is permanently barred from assisting any other person representing a party (other than the State of California) in a proceeding in which the former state employee would be prohibited from appearing under Section 87401. (Section 87402.) The other provision, the “one-year ban” prohibiting a state employee from appearing before or communicating with his or her former agency in a representative capacity for the purpose of influencing the agency’s administrative or legislative action in Section 87406(d)(1), does not apply to assisting or advising other persons absent an appearance before the State of California.

1) Quasi-Judicial Proceedings

Although you will not be appearing before nor communicating with your former state employer for the purpose of influencing the agency in a judicial, quasi-judicial or other proceeding, you ask whether you may advise groups regarding the SCWA proceeding before the Coastal Commission. Thus, the first inquiry is whether the original permit you voted on was a proceeding subject to Section 87400 et seq.

“Proceeding,” as defined in Section 87401, is any judicial, quasi-judicial or other proceeding in which the State of California is a party or has a direct and substantial interest and in which you personally and substantially participate. (Section 87400(d).) A “judicial, quasi-judicial or other proceeding” is “any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative

² The two other provisions do not apply to your question. The restriction on a state employee who is negotiating prospective employment from influencing decisions affecting that employer in Section 87407 only applies to current state employees.

agency . . .” (Section 87400(c); Regulation 18741.1(a)(3).) It does not include proceedings that do not involve specific parties, such as the making of policies or rules of general application. (*Black Advice Letter, No. A-98-320.*) A proceeding to obtain a Coastal Development Permit is a “proceeding” subject to Section 87400 et seq. (See e.g. Regulation 18746.3(b)(5)(C).)

2) *New Proceedings*

Sections 87401 and 87402 do not prohibit you from offering advice for compensation in a new proceeding. Generally, when it comes to the Coastal Commission, we have advised that a “new” proceeding is one involving *different parties or different properties*. (See e.g., *Scholl Advice Letter, No. I-02-083.*) However, even when the parties or properties remain the same as in a prior proceeding, we will regard a proceeding as “new” if there are *different factual or legal issues, distinguishable from those considered in the prior proceeding*. (*Grimm Advice Letter, No. A-99-086.*) In addition, under the Coastal Act, there are three distinct phases which are subject to the jurisdiction of the Coastal Commission: (1) the land use plan; (2) the approval of zoning pursuant to the provisions of the general plan; and (3) specific coastal development permit approvals. For purposes of Sections 87401 and 87402, we have advised that each of these phases is considered a different proceeding. (*Leslie Advice Letter, No. I-89-649.*)

The application of the permanent ban in Sections 87401 and 87402 is generally fact-driven. Under your facts, the current proceeding appears to be a material amendment to the prior permit decision. The current proposal is a modification of the prior management plan emphasizing a different approach.

In the *Quarles Advice Letter, No. A-98-004*, in connection with an advice request involving a Storm Water Management permit application proceeding, we advised the official could not participate in routine follow-up and compliance issues because the former official was involved with the original proceeding. However, we also added:

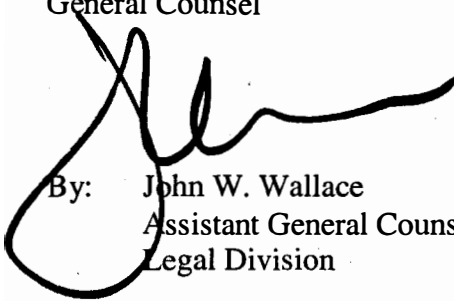
“Each amendment to the permit will be considered a new proceeding. Therefore, you may participate in amendments to the permit unless you have already participated in the specific amendment.”

Accordingly, the permanent ban does not bar you from advising on the amendment to the Coastal Development Permit before the Coastal Commission. However, the one-year ban still prohibits you from appearing before or communicating with the Coastal Commission, even when the appearance or communication is in a new proceeding.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

A handwritten signature in black ink, appearing to read 'JW Wallace', written over the typed name and title.

By: John W. Wallace
Assistant General Counsel
Legal Division